3694

SUPREME COURT OF THE UNITED STATES.

No. 215.

JAMES STINSON, PLAINTIFF IN ERROR,

vs.

HERCULES L. DOUSMAN.

IN ERROR TO THE SUPREME COURT OF THE TERRITOTY OF MINNESOTA.

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Gideon Print.

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Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Judges of the Supreme Court of the United States for the Territory of Minnesota, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said Supreme Court of the United States for the Territory of Minnesota, before you, between Hercules L. Dousman and James Stinson, a manifest error hath happened, to the great damage of the said James Stinson, as by his said complaint appears; and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fourth Monday of December next, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this twenty-seventh day of August, in the year of our Lord eighteen hundred and fifty-six, and of the independence of the United States the eightieth.

GEORGE W. PRESCOTT,
[SEAL.] *Clerk Sup. Court, Min. Ter.*

To the honorable Judges of the Supreme Court of the United States.

The return to this writ appears by the schedule hereto annexed.

The answer of the judges of the supreme court of Minnesota Territory within mentioned.

Attest: GEORGE W. PRESCOTT,
Clerk.

THE UNITED STATES OF AMERICA,
Territory of Minnesota:

To the honorable the Judge of the District Court within and for the second judicial district, county of Ramsey, and Territory of Minnesota, greeting:

Because, in the record and proceedings, and also in the rendition of judgment in a certain action, lately, in said district court, before you,

wherein Hercules L. Dousman was plaintiff and James Stinson was defendant, error has intervened, as it is said, to the damage of the said James Stinson; and we being willing that such error, if any there be, should be corrected, and full and speedy justice done in that behalf, do, in the name of the United States, command you, that if final judgment be thereupon given, then without delay you send to us, distinctly and openly, under the seal of your court, and annexed to this writ, a certified transcript of the judgment-roll remaining of record in your court in the action aforesaid, together with an authenticated copy of the original files, bill of exceptions, and pleadings therein, so that, having the same in our supreme court, in and for the Territory of Minnesota, on the first day of the next term thereof, at the capitol, in the city of St. Paul, we may cause further to be done thereupon in our said supreme court, what of right and according to the laws of the land ought to be done.

Witness the Hon. Wm. H. Welsh, chief justice of said supreme court at St. Paul aforesaid, this 30th day of March, A. D. 1855.

GEO. W. PRESCOTT, *Clerk*.

To the judge of the supreme court in and for the Territory of Minnesota: The return to this writ appears by the schedule herewith transmitted. The answer of the judge of the district court within mentioned.

GEO. W. PRESCOTT,
Clerk of Dist. Ct., Ramsey County.

The foregoing endorsed: Supreme court for the Territory of Minnesota—James Stinson, pl'ff in error, against Hercules L. Dousman, def't. in error—Writ of error—Filed in dist. court, Ramsey county, March 30, 1855.

GEO. W. PRESCOTT, *Clerk*.

Returned June 6, 1855.

GEO. W. PRESCOTT, *Clerk*.
EMMETT & MOSS,
Att'ys of Pl'ff's in Error.

TERRITORY OF MINNESOTA,
DIST. COURT 2D DISTRICT, *County of Ramsey:*

HERCULES L. DOUSMAN
against
JAMES STINSON.
} Summons.

To the defendant, James Stinson:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers, at their office in the city of St. Paul, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the said

complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of four hundred and eighty-one dollars and sixteen cents, with interest thereon from the 14th day of September, 1854, besides the costs of this action.

RICE, HOLLINSHEAD & BECKER,
Att'ys for Pl'ff.

St. Paul, 1854.

TERRITORY OF MINNESOTA,
DISTRICT COURT 2D DISTRICT, *County of Ramsey:*

HERCULES L. DOUSMAN
against
JAMES STINSON. } Complaint.

The complaint of Hercules L. Dousman, the plaintiff in the above entitled action, respectfully shows to this court, that on the 7th day of February, 1854, at Prairie du Chien, in the State of Wisconsin, James Stinson, the def't, made and duly executed, under his hand and seal, a covenant or agreement, in writing, with the plaintiff, in the words and figures following, to wit:

"This indenture, made the 7th day of February, in the year of our Lord one thousand eight hundred and fifty-four, between Hercules L. Dousman, of Crawford county, State of Wisconsin, party of the first part, and James Stinson, of St. Paul, Territory of Minnesota, party of the second part, witnesseth: That the said party of the first part, in consideration of the sum of one dollar, part of the purchase-money hereinafter mentioned, now actually paid, upon the express condition that the said party of the second part, his heirs, executors, administrators and assigns, shall, and do well and faithfully perform the covenants hereinafter mentioned, on the part of the said party of the second part, to be performed, does hereby, for himself, his heirs and assigns, covenant and engage to execute and deliver to the said party of the second part, his heirs and assigns, a deed of conveyance in fee simple, with a covenant of warranty in the usual form, of and for all that certain piece or parcel of land, situated in the town of St. Paul, in the county of Ramsey, and Territory of Minnesota, and known and designated on the plot of said town as town-lot numbered one, (1,) in block numbered eighteen, (18,) in Rice and Irvin's addition to the town of St. Paul aforesaid. And the said party of the second part, for himself, his heirs, executors, administrators and assigns, doth covenant and engage to and with the said party of the first part, his heirs, executors, administrators and assigns, to pay the said party of the first part, his heirs and assigns, the just and full sum of eight thousand dollars, in manner following, viz: two thousand dollars on the first day of September next, (1854,) with interest from the date hereof, at the rate of ten pr. ct. pr. annum; two thousand dollars on the 7th day of February, A. D. 1856; and four thousand dollars on the 7th day of February, A. D. eighteen hundred and fifty-eight, (1858,) with interest to be paid

annually from the date hereof, at the rate of ten pr. ct. pr. annum. The said Stinson to have the buildings now on said lot kept insured for $1,500 in some good insurance company, and the policy of insurance made payable, in case of loss, to said Dousman, and to pay all the taxes that shall be assessed on the said premises from the first day of May, in the year one thousand eight hundred and fifty-three: Provided, always, (and these presents are upon this express condition,) that in case of failure in the performance of either of the covenants or agreements, on the part of the said party of the second part, to be performed, the said party of the first part, his heirs, executors, administrators and assigns, shall have the right to declare this contract void, and thereupon to recover, *by distress* upon the premises, or otherwise, all the interest which shall have accrued upon this contract up to the day of declaring it void, as rent for the use and occupation of said premises; to take immediate possession thereof; to regard the person or persons in possession, on such termination of the contract, as tenant or tenants, holding without permission, if that should be necessary to regain the prompt possession of the premises; and to recover all damages sustained by reason of unnecessary destruction of timber or trees growing on such premises, or by holding over without permission.

"In witness whereof, the said parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

H. L. DOUSMAN, [SEAL.]
JAMES STINSON, [SEAL.]

"Signed, sealed, and delivered in presence of—
IRA B. BRENSON,
H. A. WRIGHT.

"It is understood that after the first payment of $2,000 and interest is made, as above stipulated, that said Stinson may then have a deed for the above-mentioned lot, by paying the remaining $6,000 and interest, in cash, or by giving security to the satisfaction of said Dousman that said payments and interest will be punctually made, as above stated. H. L. DOUSMAN."

That the said covenant or agreement in writing was, on the day of the date thereof, duly delivered in duplicate to the parties thereto respectively.

And the complaint of the plaintiff further respectfully shows to this court, that the defendant did not, on the first day of December, 1854, nor at any time previous thereto, pay to the plaintiff the sum of two thousand dollars, with interest from the date of the said covenant or agreement in writing, at the rate of ten pr. ct. per annum, nor any part thereof; that the defendant did not have the buildings on the lot described in said covenant or agreement in writing kept insured for $1,500, in some good insurance company, and the policy of insurance made payable, in case of loss, to the plaintiff; that the defendant did

not pay all the taxes assessed on the premises described in said covenant or agreement in writing, from the 1st day of May, 1853, and that the defendant failed entirely in the performance of either of the said covenants or agreements, on his part to be performed, according to the terms and conditions of the said quoted covenant or agreement in writing.

And the complaint of the plaintiff further respectfully shows to this court, that, on the 14th day of September, 1854, he, the plaintiff, declared the said covenant or agreement in writing to be void, pursuant to the conditions thereof, by notice or declaration in writing, in the words and *and* figures following, to wit:

"ST. PAUL, MINNESOTA,
"*September 14th*, 1854.

"MR. JAMES STINSON, *Superior, Wisconsin:*

"SIR: You are hereby notified that a certain agreement or contract in writing, entered into on the 7th day of February, A. D. 1854, wherein the undersigned is the party of the first part, and you are the party of the second part, by the terms of which agreement or contract in writing the party of the first part, upon the express condition that the party of the second part, his heirs, executors, administrators, and assigns, should and did well and faithfully perform the covenants in said agreement or contract, mentioned to be performed on the part of the said party of the second part, his heirs and assigns, did covenant and engage to execute and deliver to the said party of the second part, his heirs and assigns, a deed of conveyance in fee simple, with a covenant of warranty, in the usual form, for all that certain piece or parcel of land situate in the town of St. Paul, in the county of Ramsey and Territory of Minnesota, and known and designated on the plat of said town as town-lot numbered one, (1,) in block numbered eighteen, (18,) in Rice and Irvin's addition to the town of St. Paul aforesaid, is hereby declared to be void; for the reason that the sum of two thousand dollars, which, by the terms of said contract, was to have been paid the said party of the first part by the party of the second part, on the first day of September, A. D. 1854, with interest at the rate of ten per cent. per annum from the date of said contract, has not been paid, as is therein provided and expressed; and also for the reason that the buildings on said lot have not been kept insured for fifteen hundred dollars, and the policy made payable, in case of loss, to the party of the first part, as is therein provided and expressed; and because the covenants and engagements therein entered into by the said party of the second part have hitherto been and still are unperformed, in direct violation of the spirit and letter of the said agreement or contract in writing. You are also notified that the undersigned claims the immediate possession of said premises, and that the persons holding said premises as tenants have been notified to pay rent to the undersigned, from and after the first day of September, A. D. 1854.

"This declaration is made in pursuance of the right expressly given to the party of the first part, by the terms of said agreement or contract in writing.

"Yours, respectfully,

"H. L. DOUSMAN."

That the said recited notice or declaration, in writing, was duly deposited at the post office, in St. Paul, in the Territory of Minnesota, directed to the defendant, at Superior, Douglass county, Wisconsin, where the defendant then was, and another copy thereof was duly deposited in said post office, directed to the defendant, at St. Paul, in the Territory of Minnesota, where the defendant generally resides; and that, as the plaintiff is informed and believes, the defendant received the said notice or declaration in writing in due course of mail.

And the complaint of the said plaintiff further respectfully shows to this court, that the defendant hath not paid the interest which accrued upon the said contract, covenant, or agreement, in writing, from the date thereof until the time when the same was declared void as aforesaid, nor any part thereof, as rent for the use and occupation of said premises, although the defendant was in possession of said premises during the whole of said time, but the whole of the interest which so accrued upon the said contract remains due and owing from the defendant to the plaintiff.

Wherefore the plaintiff demands judgment against the defendant for the sum of four hundred and eighty-one dollars and sixteen cents, being the interest on the sum of eight thousand dollars from the seventh day of February, 1854, to the 14th day of September, 1854, together with interest thereon from the said 14th day of September, 1854.

RICE, HOLLINSHEAD & BECKER,
Attorneys for Plaintiff.

TERRITORY OF MINNESOTA,
County of Ramsey, ss:

William Hollinshead, of said county, being duly sworn says, that he is one of the attorneys for the plaintiff in the above entitled action, and that the foregoing complaint is true of his own knowledge, except as to matters which are therein stated upon information or belief, and that as to those matters he verily believes it to be true; that the means of his knowledge, or the grounds of his belief upon the subject are, that he has in his possession the original covenant or agreement in writing, and the original notice or declaration set forth and specified in said complaint; that the other facts set forth in said complaint have been stated to deponent by the plaintiff, which statement deponent believes to be true; that the reason why this affidavit or verification is not made by the plaintiff is, that he is absent from the county where his attorneys reside.

WM. HOLLINSHEAD.

Sworn to and subscribed before me, Oct. 30, 1854.

F. McCORMICK,
Notary Public, Ramsey County, M. T.

The foregoing summons and complaint endorsed as follows:

"TERRITORY OF MINNESOTA,
County of Ramsey, ss:

"Geo. L. Becker, of said county, being duly sworn says, that he served a true copy of the within summons and complaint on James Stinson, the defendant, at St. Paul, by delivering the same to him personally on the 30th day of October, 1854.

GEO. L. BECKER.

"Sworn to and subscribed before me, Oct. 30th, 1854.
F. McCORMICK,
Notary Public, Ramsey County, M. T."

Also endorsed: "Territory of Minnesota, district court 2d district, county of Ramsey"—"Hercules L. Dousman against James Stinson." "Summons and complaint"—"To file"—Filed Jan'y 24th, 1855.
GEO. W. PRESCOTT, *Clerk.*
RICE, HOLLINSHEAD, & BECKER,
Att'y for Pl'ff."

TERRITORY OF MINNESOTA,
2d Judicial District, Ramsey County, ss:

District Court.

HERCULES L. DOUSMAN
vs.
JAMES STINSON.

And now comes the said defendant, according to the statute in such cases made and provided, and for answer to so much of the complaint of said plaintiff as he is advised it is material or necessary for him to answer, says, that he admits the execution and delivery of the contract in said complaint set forth.

And as to the allegation in said complaint contained, "that defendant did not on the 1st day September, 1854, nor at any other time previous thereto, pay to the plaintiff the sum of two thousand dollars, with interest from the date of said covenant or agreement in writing at the rate of ten per cent. per annum, nor any part thereof," the defendant says, that after the execution and delivery of the contract aforesaid, the defendant, at the special instance and request of the plaintiff, to wit, on the 7th day of February, 1854, did, at Prairie du Chien, in the State of Wisconsin, for the payment of said sum of two thousand dollars, and interest as aforesaid, due by the terms of said contract on the 1st day of September, 1854, execute and deliver to the plaintiff his, said defendant's, certain negotiable promissory note in writing, dated said 7th day of February, 1854, whereby he promised to pay to the plaintiff, or order, the sum of two thousand dollars, on or before the 1st day of September, 1854, with interest at the rate of ten per cent. per annum from the date thereof, and which said promissory note the

plaintiff then and there accepted, and received from the defendant for the payment aforesaid, due by the terms of said contract, on said 1st day of September, 1854.

And defendant further says, that before said note became due or payable, the plaintiff constituted and appointed N. Corwith & Co., of Galena, Illinois, his agents to receive the payment of said note when due, and then and there sent said note to said Corwith & Co. at Galena aforesaid, to be paid according to the terms thereof; that, by an arrangement with the plaintiff, said note was to be paid by defendant to said Corwith & Co. at Galena aforesaid, by a draft of Thomas Stinson, of Hamilton, Canada, the father and agent of defendant, payable to the order of said Corwith & Co.; that, in pursuance of said last mentioned arrangement, said Thomas Stinson, on behalf of defendant, on the 21st day of August, 1854, at said Hamilton, Canada, having made arrangements for the acceptance and payment thereof, and having reason to believe, and believing that he had funds and money in the hands of R. K. Swift, esq., at Chicago, in the State of Illinois, sufficient to meet the same, drew his certain bill of exchange, or draft as aforesaid, on said R. K. Swift, in the words and figures following:

"CANADA, HAMILTON, 21 *Aug.* 1854.

"$2,138 75.

"R. K. SWIFT, Esq., *Chicago:*

"Please pay to the Messrs. Corwith & Co., or order, the sum of two thousand one hundred and thirty-eight dollars 75 cents, and charge the same to my ac.

"Yours, &c., &c.

"Signed THOMAS STINSON."

And then and there, at the request of the plaintiff, forwarded the same by mail to said Corwith and Co., at Galena aforesaid, for the purpose of paying said note at its maturity. And the defendant further says, that on the 25th day of August aforesaid, said draft was duly received and accepted by said Corwith & Co., at Galena aforesaid, as the agents of the plaintiffs as aforesaid, and by them, with the consent of said plaintiff, used and appropriated in their individual business as bankers and exchange brokers; that, on the 28th day of August aforesaid, at the request of the Chicago Bank, said draft was presented at the office of the said Swift for payment; but, owing to the absence of said Swift and his principal clerk at the time of such presentation, payment thereof was, my mistake, refused; and thereupon, on the day and year last aforesaid, the same was protested for non-payment by Ashley Gilbert, a notary public of said State of Illinois; that, on the 1st day of September, 1854, said Corwith & Co., at the instance of the plaintiff, returned said promissory note to the plaintiff at Prairie du Chien aforesaid, although the same had not yet matured, (the three days of grace for the payment thereof not having expired,) nor had said note been dishonored; that said Thomas Stinson was not notified of the non-

payment and protest of the draft aforesaid until the 7th day of September aforesaid, at which time the same was returned to him, and therewith a notice that said promissory note had been returned to the plaintiff as aforesaid; whereupon said Thomas Stinson, on said last mentioned day, and behalf of defendant, forwarded to the plaintiff at said Prairie du Chien, for the payment of said note, another draft or bill of exchange, drawn on the Messrs. Ward & Co., New York, for the sum of £530 2 4 cy.; that said last mentioned draft or bill of exchange, as defendant believes, reached said Prairie du Chien on the 11th day of September aforesaid, before the commencement of this action and prior to the date of the notice in the complaint set forth; that said last mentioned draft also was returned to the said Thomas Stinson by said plaintiff on or about the 25th day of September aforesaid, but without objection as to the character, amount, or value of said draft.

And defendannt further says, that at the time said promissory note became due and payable, and from thence hitherto, he has been and still is ready to pay to the plaintiff or his assigns the full amount thereof, with interest; and then and there, at Prairie du Chien aforesaid, on the 12th day of October, 1854, and before the commencement of this action, tendered and offered to pay to the plaintiff the sum of two thousand one hundred and forty dollars, being the amount of said note, with interest at the rate aforesaid, compounded thereon to the date last aforesaid, to receive which of the defendant said plaintiff then and there wholly refused; and the defendant now brings said money, so tendered, into court here, ready to be paid to the plaintiff, in satisfaction of the amount due him as aforesaid, if he will accept the same.

And defendant further states, that said promissory note is still outstanding against him in the hands of the plaintiff or his assigns; and as to the allegation in said complaint, "that the defendant did not have the buildings on the lot described in said covenant, or agreement in writing, kept insured for $1,500 in some good insurance company, and the policy of insurance made payable in case of loss to the plaintiff," the defendant says that, on the 21st day of February, 1854, in pursuance of said contract, he did, by a policy of insurance of that date, and now to the court here shown, cause the dwelling-house on said premises to be insured for said sum of fifteen hundred dollars in the "Hartford Fire Insurance Company," of Hartford, Connecticut, a company then and now in good repute, and believed by defendant to be solvent, and has ever since kept said building so insured therein; that, on the 9th day of October, 1854, before the commencement of this action, he obtained the consent of said insurance company to the transfer of his, said defendant's, interest in said policy to the plaintiff, and on the 12th day of October aforesaid transferred, assigned, and set over to said plaintiff all his, said defendant's, right, title, and interest to said policy, and all benefit to be derived therefrom; and then and there, on the day last aforesaid, at Prairie du Chien aforesaid, offered and tendered to the plaintiff the policy aforesaid so transferred and assigned, to receive which of the defendant the plaintiff then and there wholly

refused, and defendant now brings the same into court here, ready to be delivered to the plaintiff, if he will accept the same. And defendant further says, that the buildings on said premises have not, since the making of the contract aforesaid, sustained any loss or damage by fire, nor has the plaintiff been damaged thereby in the premises. And the defendant further says, that at the time of the making and delivery of the contract in the complaint set forth, it was the distinct understanding and agreement of the parties thereto that the amount thereafter to be paid by any insurance company for a loss or damage by fire to the premises aforesaid, was to be applied by the plaintiff as a payment *pro tanto* on the eight thousand dollars purchase-money of said premises; but inadvertently the stipulation to that effect was omitted in said contract, and that defendant delayed making an assignment of said policy during the period aforesaid, that he might see the plaintiff, and have the omission aforesaid rectified, and the assignment made conformable to the understanding of the parties as aforesaid.

And as to the allegation in said complaint, "that the defendant did not pay all the taxes assessed on the premises described in said covenant or agreement in writing, from the 1st day of May, 1853," the defendant says, that on the 30th day of July, 1854, at St. Paul aforesaid, he paid the district school-tax assessed on said premises; that, on the 10th day of October aforesaid, he called on the collector of taxes to pay the taxes assessed on said premises for the year 1853, and found that they had previously, on the 12th day of September, 1854, been paid, and, as defendant believes, by the plaintiff, but without the knowledge or consent of the defendant; that, on or about the 11th day of October aforesaid, and before the commencement of this action, defendant, by his agent, paid all the taxes assessed upon said premises for the year 1854; that, on the 12th day of October aforesaid, before the commencement of this action, the defendant offered and tendered to the plaintiff, at Prairie du Chien aforesaid, the sum of forty dollars for the taxes of the year 1853, so by defendant paid as aforesaid, and being the full amount thereof with interest; to receive which the plaintiff then and there wholly refused, and the defendant now brings the same into court here, to be paid to the plaintiff for said taxes, if he will receive the same. And the defendant further says, that on or about the 26th day of October aforesaid, the street commissioners of the Third Ward of the city of St. Paul aforesaid having built, at the expense of said city, a sidewalk along the front of said premises, and charged or assessed the cost thereof upon said premises, as provided by an ordinance of said city, he, the defendant, called upon George L. Becker, the authorized agent of said commissioners for building and collecting the assessment made for the sidewalk aforesaid, and offered and tendered to said Becker, as such agent, the amount so assessed or charged against said premises for the construction of said sidewalk; but the said Becker, being also the agent and one of the attorneys of the plaintiff in the prosecution of this action, refused to receive the same, or give defendant any satisfaction in the premises, and informed said defend-

ant that the sidewalk had been paid for. Defendant further says, that the amount with which said premises are chargeable for the construction of said sidewalk is $124 20; that he has at all times been ready and willing to pay said amount assessed as aforesaid, and now brings the money into court here, to be paid to the plaintiff for the purpose aforesaid, if he will receive the same. And so defendant says, that he has paid, and offered to pay as aforesaid, *all taxes* assessed upon said premises for any and all purposes since the 1st day of May, 1853; that no loss or damage has been sustained by said premises or the plaintiff by reason of any delay in the payment thereof; nor have said premises been forfeited or sold for the non-payment of said taxes, or any part of them.

And further answering the allegation of said complaint, defendant says, that he has not failed entirely in the performance of either of the covenants or agreements on his part to be done or performed, as in said complaint alleged, but on the contrary has done and performed, and offered to do and perform, and still is ready to do and perform, all things on his part to be done by the terms of said contract.

And as to the further allegation in said complaint, "that the deft. hath not paid the interest which accrued upon the said contract, covenant or agreement in writing, from the date thereof until the time when the same was declared void, as aforesaid, nor any part thereof, as rent for the use and occupation of said premises, although the deft. was in possession of said premises during the whole of said time, but the whole of the interest which accrued upon the said contract remains due and owing from the defendant to the plaintiff," deft. says that he has paid all the interest due the plaintiff by the terms of said contract, and is ready and willing to pay to the plaintiff, according to the terms of said contract, all the interest accruing thereon; and the defendant denies that the whole or any part of the interest accruing upon said contract remains due or owing from the deft. to the plaintiff.

Wherefore the defendant asks to be dismissed with his reasonable costs.

EMMETT & MOSS, and
D. COOPER,
Att'ys for Def't.

STATE OF MINNESOTA, *county of Ramsey, ss:*

James Stinson, the defendant in the above-entitled action, being duly sworn, says that the foregoing answer is true of his own knowledge, except as to matters which are therein stated upon information or belief, and as to such matters that he believes it to be true.

JAMES STINSON.

Subscribed and sworn to before me, this 16th day of November, 1854.

GEO. W. PRESCOTT,
Clerk af said court.

The foregoing answer endorsed: "Hercules L. Dousman vs. James Stinson"—"Answer"—"Filed Nov. 16, 1854"—"Geo. W. Prescott, clerk"—"Emmett & Moss, D. Cooper, Atty's. for Deft's."

TERRITORY OF MINNESOTA,
District Court, 2d district, county of Ramsey.

HERCULES L. DOUSMAN against JAMES STINSON. } Demurrer to answer.

The plaintiff demurs to the new matter stated in the answer of the defendant in this action, for the insufficiency thereof, and specifies for ground of objection thereto the causes following:

That the said new matter does not constitute a defence to the claim of the plaintiff, and is not stated in conformity with the statute, for these reasons:

1st. That the following part of the said answer does not constitute a defence to the claim of the plaintiff, and is not stated in conformity with the statute, viz:

"The defendant says that after the execution and delivery of the contract aforesaid, the defendant, at the special instance and request of the plaintiff, to wit: "On the 7th of February, 1854, at Prairie du Chien, in the State of Wisconsin, for the payment of said sum of two thousand dollars, and interest as aforesaid, due by the terms of said contract on the 1st day of September, 1854, executed and delivered to the plaintiff his, said defendant's, certain negotiable promissory note in writing, dated said 7th day of February, 1854, whereby he promised to pay to the plaintiff, or order, the sum of two thousand dollars on or before the 1st day of September, 1854, with interest at the rate of ten per cent. per annum from the date thereof, and which said promissory note the plaintiff then and there accepted and received from the defendant for the payment aforesaid, due by the terms of said contract on the said 1st day of September, 1854."

Because no fact is stated showing that the plaintiff agreed to receive the said promissory note in payment of the sum due to the plaintiff upon the contract specified in the complaint, or that he did accept and receive the said note in payment of the said sum; the allegations of the defendant that he accepted and received the said promissory note in payment of the said sum being a mere conclusion of law, without any fact whatever to support it.

Because no fact is stated, showing that the plaintiff, in consideration of the giving of the said promissory note or otherwise, ever agreed to relinquish, or did relinquish any of his rights under the contract specified in the complaint, or showing that the said promissory note was given or received otherwise than as further or additional security for the purchase-money specified in the said contract, or showing that the plaintiff had not a perfect right to resort to his remedy upon the said contract, or upon the said promissory note, as he might choose.

And because it appears from the said answer, that the said promis-

sory note remained in the possession and ownership of the plaintiff until the same was due; that it has not been paid by the defendant, and that the revocation of the said contract by the plaintiff, as stated in his complaint, would be a complete bar to any action against the defendant upon the said promissory note.

2nd. That the following part of the said answer does not constitute a defence to the claim of the plaintiff, and is not stated in conformity with the statute, viz:

"And the defendant further says, that before said note became due or payable, the plaintiff constituted and appointed N. Corwith & Co., of Galena, Illinois, his agents to receive the payment of said note, when due; and then and there sent said note to said Corwith & Co., at Galena aforesaid, to be paid according to the terms thereof. That by an arrangement with the plaintiff, said note was to be paid by defendant to said Corwith & Co., at Galena aforesaid, by a draft of Thomas Stinson, of Hamilton, Canada, the father and agent of the defendant, payable to the order of said Corwith & Co. That in pursuance of said last-mentioned arrangement, said Thomas Stinson, on behalf of defendant, on the 21st day of August, 1854, at said Hamilton, Canada, having made arrangements for the acceptance and payment thereof, and having reason to believe, and believing that he had funds and money in the hands of R. K. Swift, esq., at Chicago, in the State of Illinois, sufficient to meet the same, drew his certain bill of exchange or draft as aforesaid on said R. K. Swift, in the words and figures following:

"$2,138 75. "CANADA, HAMILTON, 21*st Aug.* 1854.

"R. K. SWIFT, Esq., Chicago: Please pay to the Messrs. Corwith & Co., or order, the sum of two thousand one hundred and thirty-eight dollars and 75 cents, and charge the same to my ac.

"Yours, &c.,

(Signed) "THOMAS STINSON."

"And then and there at the request of the plaintiff forwarded the same by mail to said Corwith & Co., at Galena aforesaid, for the purpose of paying said note at its maturity. And defendant further says, that on the 25th day of August aforesaid, said draft was duly received and accepted by said Corwith & Co., at Galena aforesaid, as the agents of the plaintiff as aforesaid, and by them, with the consent of said plaintiff, used and appropriated in their individual business as bankers and exchange brokers. That on the 28th day of August aforesaid, at the request of the Chicago Bank, said draft was presented at the office of said Swift for payment, but owing to the absence of the said Swift and his principal clerk at the time of such presentation, payment thereof was by mistake refused; and thereupon, on the day and year last aforesaid, the same was protested for non-payment by Ashley Gilbert, a notary public of said State of Illinois. That on the 1st day of September, 1854, said Corwith & Co., at the instance of

the plaintiff, returned said promissory note to the pl'ff at Prairie du Chien aforesaid, although the same had not yet matured, (the three days of grace for the payment thereof not having expired,) nor had said note been dishonored. That said Thomas Stinson was not notified of the non-payment and protest of the draft aforesaid until the 7th day of September aforesaid, at which time the same was returned to him, and therewith a notice that said promissory note had been returned to the plaintiff as aforesaid; whereupon said Thomas Stinson on said last-mentioned day, and on behalf of defendant, forwarded to the plaintiff at said Prairie du Chien for the payment of said note another draft or bill of exchange, drawn on the Messrs. Ward & Co., of New York, for the sum of £530 2 4 c'y. That said last-mentioned draft or bill of exchange, as defendant believes, reached said Prairie du Chien on the 11th day of September aforesaid, before the commencement of this action and prior to the date of the notice in the complaint set forth. That said last-mentioned draft also was returned to said Thomas Stinson, on or about the 25th day of September aforesaid, but without objection as to the character, amount or value of said draft."

Because it does not relate to any allegation in the plaintiff's complaint in any manner, but refers to matters wholly foreign to the subject-matter of the action, and amounts to nothing more (if it amounts to anything) than an averment that the defendant did not pay the sum due to the plaintiff upon said contract at the time when the same was due, because he hadn't the money, which may be a good reason for not paying it, but it is no defence against the remedy upon the said contract adopted and sought by the plaintiff.

3rd. That the following part of the said answer does not constitute a defence to the claim of the plaintiff, and is not stated in conformity with the statute, viz:

"And defendant further says, that at the time said promissory note became due and payable, and from thence hitherto, he has been, and still is, ready to pay the plaintiff or his assigns the full amount thereof with interest; and, then and there, at Prairie du Chien aforesaid, on the 12th day of October, 1854, and before the commencement of this action, tendered and offered to pay to the plaintiff the sum of two thousand one hundred and forty dollars, being the amount of said note, with interest at the rate aforesaid compounded thereon, to the date last aforesaid, to receive which of the defendant, said plaintiff then and there wholly refused, and the defendant now brings said money so tendered into court here, ready to be paid to the plaintiff, in satisfaction of the amount due him as aforesaid, if he will accept the same; and the defendant further states, that said promissory note is still outstanding against him, in the hands of the plaintiff or his assigns."

Because this action is upon a special contract whereby the defendant covenanted and agreed to pay to the plaintiff two thousand dollars on the 1st day of September, 1854, and not that he would pay or tender to the plaintiff two thousand one hundred and forty dollars on the

12th day of October, 1854, after the said contract had been declared void by the plaintiff pursuant to its provisions.

Because, the only breach of contract or default alleged in the complaint is in the failure of the defendant to pay two thousand dollars to the plaintiff on the 1st day of September, 1854, and his failure to insure the property and pay the taxes as agreed in said contract; and it is not, therefore, any answer to a complaint for such default, that the defendant tendered to the plaintiff two thousand one hundred and forty dollars, or any other sum, on the 12th day of October, 1854.

And because no action could be sustained upon the said promissory note against the defendant at the suit of the plaintiff, or any person to whom he may transfer the same, the contract which formed the consideration of the said note having been declared void by the plaintiff, and he having, as appears from said answer, held the said note until it was due.

4th. That the following part of the said answer does not constitute a defence to the claim of the plaintiff, and is not stated in conformity with statute, viz:

"And, as to the allegation in said complaint, that the defendant did not have the buildings on the lot described in said covenant, or agreement in writing, kept insured for $1,500, in some good insurance company, and the policy of insurance made payable in case of loss to the plaintiff; the defendant says, that on the 21st day of February, 1854, in pursuance of said contract, he did, by a policy of insurance of that date, and now in the court here shown, cause the dwelling-house on said premises to be insured, for said sum of fifteen hundred dollars, in the Hartford Fire Insurance Company, of Hartford, Connecticut, a company then and now in good repute, and believed by defendant to be solvent, and has ever since kept said building so insured therein; that on the 9th day of October, 1854, before the commencement of this action, he obtained the consent of said insurance company to the transfer of his, said defendant's, interest in said policy to the plaintiff, and on the 12th day of October aforesaid, transferred, assigned, and set over to said plaintiff all his, said defendant's, right, title, and interest to said policy, and all benefit to be derived therefrom; and then and there, on the day last aforesaid, at Prairie du Chien aforesaid, offered and tendered to the plaintiff the policy aforesaid so transferred and assigned, to receive which of the defendant the plaintiff then and there wholly refused.

"And the defendant now brings the same into court here, ready to be delivered to the plaintiff, if he will accept the same; and the defendant further says, that the buildings on said premises have not, since the making of the contract aforesaid, sustained any loss or damage by fire, nor has the plaintiff been damaged thereby in the premises."

Because the same is not responsive to any allegation in the complaint, and is an admission that the defendant did not perform his covenant to keep the buildings on the lot described in said covenant

insured for $1,500, in some good insurance company, and the policy of insurance made payable, in case of loss to the plaintiff; and that, on the 14th day of September, 1854, when the contract was declared void, the defendant had utterly violated the provision therein in reference to insurance.

And, because, this action is not for damages occasioned by fire, but for interest, as rent for the use and occupation of the property by the defendant.

5th. That the following part of the said answer does not constitute a defence to the claim of the plaintiff, and is not stated in conformity with the statute, viz:

"And the defendant further says, that at the time of making and delivery of the contract in the complaint set forth, it was the distinct understanding and agreement of the parties thereto, that the amount thereafter to be paid by any insurance company for a loss or damage by fire to the premises aforesaid, was to be applied by the plaintiff as a payment pro tanto on the eight thousand dollars purchase-money of said premises, but inadvertently the stipulation to that effect was omitted 'in' said contract; and that defendant delayed making an assignment of said policy during the period aforesaid, that he might see the plaintiff and have the omission aforesaid rectified, and the assignment made conformable to the understanding of the parties as aforesaid."

Because it is an attempt to set up an alleged verbal "understanding" to add to, vary from, and contradict the express terms of a written contract under seal.

And because the reasons set forth are (even if admissible at all) insufficient to justify or excuse the violation of his contract by the defendant, as the amount paid by an insurance company for loss or damage by fire, upon a policy made in conformity with the terms of the said contract, would have been applied by operation of law as a payment to that extent upon the purchase-money of the property specified in the contract.

6th. That the following part of the said answer does not constitute a defence to the claim of the plaintiff, and is not stated in conformity with the statute, viz:

"And as to the allegation in said complaint, that the defendant did not pay all the taxes assessed on the premises, described in said covenant or agreement in writing, from the 1st day of May, 1853, the defendant says that on the 30th day of July, 1854, at St. Paul, aforesaid, he paid the district school-tax assessed on said premises. That on the 10th day of October aforesaid, he called on the collector of taxes to pay the taxes assessed on said premises for the year 1853, and found that they had previously, on the 12th day of September, 1854, been paid, and, as defendant believes, by the plaintiff, but without the knowledge or consent of the defendant. That on or about the 11th day of October aforesaid, and before the commencement of this action, defendant, by his agent, paid all the taxes assessed upon said premises

for the year 1854. That on the 12th day of October aforesaid, before the commencement of this action, the defendant offered and tendered the plaintiff, at Prairie du Chien aforesaid, the sum of forty dollars, for the taxes of the year 1853, so by defendant paid as aforesaid, and being the full amount thereof with interest; to receive which, the plaintiff then and there wholly refused, and the defendant now brings the same into court here, to be paid to the plaintiff for said taxes, if he will receive the same. And the defendant further says, that on or about the 26th day of October aforesaid, the street commissioners of the third ward of the city of St. Paul aforesaid, having built, at the expense of said city, a sidewalk along the front of said premises, and charged or assessed the costs thereof upon said premises, as provided by an ordinance of said city, he, defendant, called upon George L. Becker, the authorized agent of said commissioners for building and collecting the assessment made for the sidewalk aforesaid, and offered and tendered to said Becker, as such agent, the amount so assessed or charged against said premises for the construction of said sidewalk, but the said Becker, being also the agent and one of the attorneys of the plaintiff in the prosecution of this action, refused to receive the same or give defendant any satisfaction in the premises, and informed said defendant that the said sidewalk had been paid for. Defendant further says, that the amount with which said premises are chargeable for the construction of said sidewalk is $124 20. That he has at all times been ready and willing to pay said amount, assessed as aforesaid, and now brings the money into court here to be paid to the plaintiff, for the purpose aforesaid, if he will receive the same."

Because the default or violation of contract complained of in the complaint is such as occurred prior to the 14th day of September, 1854, when the same was declared void, and no act done or attempted to be done by the defendant, under or pursuant to the terms of the said contract, after the same had been declared void by the plaintiff, in the exercise of his right derived from the said contract, is any legal defence to the claim of the plaintiff in this action.

And because the said part of the said answer is an admission that the defendant had, on the said 14th day of September, 1854, utterly violated his said contract relative to the said taxes, as alleged in the said complaint, and had thereby justified the declaration of the plaintiff annulling the same.

7th. That the following part of the said answer does not constitute a defence to the claim of the plaintiff, and is not stated in conformity with statute, viz:

"And as to the further allegation in the said complaint, 'that the defendant hath not paid the interest which accrued upon the said contract, covenant, or agreement in writing, from the date thereof until the time when the same was declared void as aforesaid, nor any part thereof, as rent for the use and occupation of the said premises, although the defendant was in possession of said premises during the whole of

said time, but the whole of the interest which accrued upon the said contract remains due and owing from the defendant to the plaintiff,' defendant says that he has paid all the interest due the plaintiff by the terms of said contract, and is ready and willing to pay to the plaintiff, according to the terms of said contract, all the interest accruing thereon, and defendant denies that the whole or any part of the interest accruing upon said contract remains due or owing from the defendant to the plaintiff."

Because the said portion of the said answer is contradictory of itself and of the other portions of the said answer. The defendant, in parts of said answer, admits that he has not paid, but avers that he has tendered the principal and interest due to the plaintiff on the said contract; and here he says he has paid all of the interest due to the plaintiff by the terms of the said contract, and then immediately following he says he is ready and willing to pay.

And because the said portion of said answer does not contain the facts of said alleged payment, stating when, to whom, and what amount was paid, so that the court might infer whether it was all that was due or not.

And because the said portion of the said answer is a negative pregnant, concealing all the facts and denying only a conclusion of law, and therefore not responsive to any allegation in the complaint, nor in avoidance of the plaintiff's claim.

RICE, HOLLINSHEAD & BECKER,
Attorneys for Plaintiff.

November 20, 1854.

The foregoing demurrer endorsed: Territory of Minnesota, district court 2d district, county of Ramsey—Hercules L. Dousman against James Stinson—Demurrer to answer—Due service of a copy of the within demurrer on us, this 21st day of November, 1854, is hereby admitted—Emmet & Moss, and D. Cooper, atty's for def't—Filed Jan'y 24, 1855—Geo. W. Prescott, clerk.

RICE, HOLLINSHEAD & BECKER,
Atty's for Pl'ff.

TERRITORY OF MINNESOTA,
DISTRICT COURT 2D DIST., *County of Ramsey.*

HERCULES L. DOUSMAN
against
JAMES STINSON.

Application having been made to me for the hearing and determination of the question of law arising from the demurrer of the plaintiff to the answer of the defendant in the above entitled action, I do, pursuant to the statute in such cases made and provided, hereby appoint

Thursday, the 7th day of December next, at 10 o'clock a. m., at my chambers in the city of St. Paul, to hear and determine the same.

M. SHERBURNE, *Judge*.

At chambers, November 30th, 1854.

GENTLEMEN: Please take notice of the above order.

Yrs. resp'ly,

RICE, HOLLINSHEAD & BECKER,
Att'ys for Pl'ff.

To Messrs. EMMET and Moss, and
D. COOPER, Esq., *Att'ys for Def't.*

Nov. 30, '54.

The foregoing endorsed: Territory of Minnesota, district court 2d district, county of Ramsey—Hercules L. Dousman against James Stinson—Order for hearing demurrer.

Filed Jan'y 24, 1855—Geo. W. Prescott, clerk—Service accepted Nov. 30, 1854—Emmet & Moss, att'ys for def't.

RICE, HOLLINSHEAD & BECKER,
Att'ys for Pl'ff.

H. L. DOUSMAN
agst.
JAMES STINSON.

Dist. Court 2d dist., county of Ramsey.

It is hereby stipulated and agreed, that the argument of the demurrer to the answer of the defendant in this action may be heard on Friday, the 5th day of January, 1855, at 10 a. m., before Judge Sherburne, at his chambers in St. Paul, or as soon after that time as counsel can be heard.

RICE, HOLLINSHEAD & BECKER,
Att'ys for Pl'ff.

EMMET & MOSS, *Att'ys for Def't.*

St. Paul, Dec. 29, '54.

The foregoing stipulation endorsed: Filed Jan. 24th, 1855.

GEO. W. PRESCOTT, *Clerk.*

TERRITORY OF MINNESOTA,
DISTRICT COURT 2D DIST., *County of Ramsey.*

HERCULES L. DOUSMAN
agst.
JAMES STINSON.

This action came on to be heard upon the demurrer of the plaintiff to the answer of the defendant, and was argued by counsel: Whereupon it is

Ordered, That the demurrer be and the same hereby is sustained,

and that the defendant have ten days within which to file an amended answer, if he shall desire so to do.

M. SHERBURNE, *Judge*.

At Chambers, January 24th, 1855.

The foregoing endorsed: Territory of Minnesota, district court 2nd dist., county of Ramsey—H. L. Dousman agst. James Stinson—Order sustaining demurrer—Due service of a copy of within order on us, this 24th day of January, 1855, is hereby admitted—Emmet & Moss, att'ys for def't—Filed Jan'y 24th, 1855.

GEO. W. PRESCOTT, *Clerk*.

In the District Court in and for the 2nd judicial district and county of Ramsey, in the Territory of Minnesota.

HERCULES L. DOUSMAN
against
JAMES STINSON.

Isaac V. D. Heard, of said county, being duly sworn, says that he is a clerk in the office of Rice, Hollinshead & Becker, the attorneys for the above-named plaintiff in this action. That on the 24th day of January, 1855, an order was entered in this cause, sustaining the demurrer to the defendant's answer in this cause, and requiring the defendant to file an amended answer to the plaintiff's complaint, within ten days from said 24th day of January, 1855. This deponent further says, that said ten days have elapsed, and no amended answer has been filed in said cause, or any copy of an amended answer to said complaint served upon the plaintiff's attorneys.

J. V. D. HEARD.

Sworn to and subscribed before me, this 24th day of January, 1855.

GEO. W. PRESCOTT, *Clerk*.

TERRITORY OF MINNESOTA,
DIST. COURT 2D DIST., *Ramsey county*.

HERCULES L. DOUSMAN
agst.
JAMES STINSON.

Statement for Judgment.

Amount claimed on summons - - - -	$481 16
Interest " " - - - -	13 19
Costs by statute - - - - - - - -	29 00
3 affis. - - - - - - - - -	75
Clerk's fees - - - - - - - -	4 85
	$528 95

RAMSEY COUNTY, *ss:*

Isaac V. D. Heard, of said county, being duly sworn, says that he is a clerk in the office of Rice, Hollinshead & Becker, plaintiff's attor-

neys, and that the disbursements above mentioned have been actually made or incurred in this action.

J. V. D. HEARD.

Sworn to and subscribed before me, this 5 day of Feb., 1855.

GEO. W. PRESCOTT, *Clerk*.

TERRITORY OF MINNESOTA,
DISTRICT COURT, 2D DISTRICT, *County of Ramsey*.

HERCULES L. DOUSMAN
agst.
JAMES STINSON.

The court having ordered that the demurrer of the plaintiff, above named, to the answer of the defendant above named in this action, be sustained, and that the defendant have ten days within which to file an amended answer; and it appearing by affidavit of Isaac V. D. Heard, that ten days have elapsed since the making of said order, and that no amended answer has been filed in said cause, nor any copy thereof served upon plaintiff's attorneys; now, on motion of Messrs. Rice, Hollinshead & Becker, said plaintiff's attorneys, it is hereby adjudged that said plaintiff, Hercules L. Dousman, recover of said defendant, James Stinson, the sum of four hundred and ninety-four dollars and thirty-five cents, damages and interest, and thirty-four dollars and sixty cents costs, amounting to $528 95.

GEO. W. PRESCOTT, *Clerk*.

Dated February 5th, 1855.

The foregoing pleadings and papers, all attached together and endorsed: "Territory of Minnesota, Dist. Court, 2d Dist., County of Ramsey"—"Hercules L. Dousman against James Stinson"—"Judgment Roll"—"Filed Feb'y 5, 1855."

GEO. W. PRESCOTT, *Clerk*.

TERRITORY OF MINNESOTA,
DISTRICT COURT 2D JUDICIAL DISTRICT, *County of Ramsey*.

I, Geo. W. Prescott, clerk of the above entitled district court, do hereby certify that the foregoing is a true copy of the judgment roll, in the cause therein entitled, of "Hercules L. Dousman against James Stinson," as the same remains on file in my office; and that said judgment roll, on file, is composed of the original pleadings, stipulations, affidavits, and other papers in said cause.

In testimony whereof, I have hereunto set my hand and [L. S.] affixed the seal of said court, at St. Paul, in said county of Ramsey, this 6th day of June, A. D. 1855.

GEO. W. PRESCOTT, *Clerk*.

Territory of Minnesota—Supreme Court—James Stinson, Plff. in Error, against Hercules L. Dousman—Return to Writ of Error—Transcript of Judg't Roll—Filed in S. C. June 6, 1855.

GEO. W. PRESCOTT, *Clerk*.

TERRITORY OF MINNESOTA,
2D JUDICIAL DISTRICT, *Ramsey county*.

HERCULES L. DOUSMAN
vs.
JAMES STINSON.

The defendant in this action having bro't into court, with his answer, which is made and filed this day, for the benefit of the plaintiff, as appears by said answer, the sum of twenty-three hundred and four dollars and twenty cents, ($2,304 20:) It is ordered, that the same be rec'd and deposited with Mackubin & Edgerton, bankers, of St. Paul, for safe keeping, and subject to the order of this court.

St. Paul, Nov. 16, 1854.

At Chambers.

M. SHERBURNE, *Judge*.

I hereby consent that the money mentioned above be deposited with Mackubin & Edgerton.

JAMES STINSON.

MINNESOTA TERRITORY,
DISTRICT COURT 2D DISTRICT, *County of Ramsey*.

HERCULES L. DOUSMAN
against
JAMES STINSON.

Geo. W. Prescott, clerk of the court above entitled, has this day deposited with us twenty-three hundred and four $\frac{20}{100}$ dollars in gold, which is to remain subject to the order of said court in the cause above entitled.

MACKUBIN & EDGERTON.

St. Paul, Nov. 16th, 1854.

TERRITORY OF MINNESOTA,
DIST. COURT 2D DISTRICT, *County of Ramsey*.

I, Geo. W. Prescott, clerk of said court, do hereby certify that the foregoing are true copies of the original order of court and certificate of deposit, on file in my office, in the cause of Hercules L. Dousman against James Stinson.

In testimony whereof, I have hereunto set my hand and [L. S.] affixed the seal of said district court for said county, at St. Paul, in said county, this 6th day of June, A. D. 1855.

GEO. W. PRESCOTT, *Clerk*.

Dist. Court 2d Dist., County of Ramsey—Hercules L. Dousman against James Stinson—Of order of Court and Certificate of Deposit—Filed in Supreme Court June 6, 1855.

GEO. W. PRESCOTT, *Clerk*.

Supreme Court, January Term, 1856.

HERCULES L. DOUSMAN, appellee,
vs.
JAMES STINSON, appellant.
} Assignment of Errors.

The honorable and learned judge, who heard the demurrer interposed by the plaintiff to the answer of the defendant, erred in sustaining said demurrer, for the following reasons:

That the defendant may interpose, by way of answer, the equities arising in this case, and is not driven to his action for specific performance. Laws of Min. of 1853, p. 3, et seq. 4 Howard, Pr. R. 350, Dedrich vs. Heys. 8 Howard, Pr. R. 416, Hunt vs. Rogers.

That the acceptance by the plaintiff of the defendant's negotiable promissory note for the first $2,000 specified in the contract, was a satisfaction of the contract to that amount. Chitty on Cont. 769, 770, 6th Am. Ed.

That the acceptance and conversion of the first draft drawn by Thomas Stinson, a third party, under the agreement averred in the answer, was a payment of said note, and the plaintiff's remedy was on the draft. Chitty on Cont. 767, 768, 769, 770, and cases cited.

That, from the time of making the contract and taking possession under it, the equitable title to the premises was in the defendant, and could not be divested at the will of the plaintiff, for the causes stated in the complaint. 2 Lead. Ca. in Eq., 26 et seq. Story's Eq. Juris., secs. 115, 628.

Time is not of the essence of this contract, the principal object of the plaintiff being to sell the property for a given sum. 2 Lead Ca. in Eq. 19, 29. 1 McLean, 375, Longworth vs. Taylor. 3 McLean, 148. 14 Peters, 372. 2 Hill's Ch. 121. 13 U. S. Dig., p. 235, No. 203, 206. 13 Eng. L. & Eq. 416, Parkin vs. Thorwald. 6 Wheaton, 528, Brasier vs. Gratz. Story's Eq. Juris., sec. 1316. 5 Condensed R. 160, 164, 169. 3 Idem, 522 and note. 4 Peters, 449. 5 Idem, 264. 6 Idem, 389. 4 Dallas, 345. 5 Cranch, 262.

That, even if time was of the essence of the contract, and the acceptance of the defendant's note was not a payment of the first $2,000 specified in the agreement, the defendant has shown sufficient excuse for non-performance at the day, and equity will relieve him against the accident which occasioned it. Story's Eq. Juris. 747, 748, 771, 775, 776, 777.

That the proviso to the contract, except in fixing the rule of damages, states a mere conclusion of law, and might have been omitted without changing the nature of the instrument, or affecting the rights of either party under it. 2 Lead. Ca. in Eq., p. 19, Grayson vs. Riddle.

If the proviso authorizes the plaintiff to declare the contract void, and to oust the defendant of his possession of the premises, then the omission to insure for a single day, or permitting a single dollar of the taxes to remain unpaid for a single day after it was assessed, would have the same effect, and proves it clearly to be in the nature of a penalty or forfeiture, which a court of equity will not enforce. Story's Eq. Juris. 1315, 1319. Chitty on Cont. 863, 864, and 865.

That, under the proviso, non-performance at most only renders the contract voidable, and not ipso facto void. (See contract.)

That, if Dousman intended to declare the contract void upon Stinson's failure to perform at the day, he was bound to do so at the day, and his omission so to do was an acquiescence in the delay, and a waiver of his right to declare it void, after the defendant had offered to pay. 2 Lead. Ca. in Eq. 30. 5 Paige, 225. 6 Idem, 407. 7 Idem, 37.

The defendant, in any event, was entitled to reasonable notice of plaintiff's intention to insist upon payment at the precise day. 2 Lead. Ca. in Eq. 33, and cases there cited. 3 Phil. Ev. 343, 345. Chitty on Conts. 771 et seq.

That the acceptance by the plaintiff of defendant's note, which would not mature until after the day named in the contract for the payment of the first $2,000, even if it was not a satisfaction, pro tanto, of the contract, and plaintiff's conduct respecting the first draft, had a tendency to induce the defendant to believe that the precise day was not essential, and would not be insisted on. 2. Lead Ca. in Eq. 19, and cases there cited. 8 Paige, 228, 600.

Where there has been a part performance, as a part payment of the purchase-money, payment of taxes, &c., and a delivery of possession to the defendant, mere lapse of time, unless the delay was very great, would excuse the plaintiff from conveying. 3 Phil. Ev. 344, and cases cited. 3 Monroe, 313, 318, 322. 4 Idem, 500, 501. 6 Monroe, 362, 365, 368. 4 Bibb, 453, 536. 4 J. J. Marshall, 157. 1 Howard, 358.

In all cases where time is an essential part of the contract, and where there has been a part performance, courts of equity will enforce the contract, unless there is some evidence of either actual or presumptive abandonment. 2 Lead. Ca. in Eq. 29, 30. 3 John. Ca. 60, Ballard vs. Walker. 2 Devereaux Eq. 224. 4 Munf. 332, 333.

The failure of the defendant to perform at the day was the result of accident or mistake, against which equity will never refuse to relieve. See all authorities on subject of specific performance.

The plaintiff cannot maintain this action without showing that he has sustained injury, and not then if such injury will admit of compensation. 2 Lead. Ca. in Eq. 3 et seq., Seaton vs. Slade. 3 Phil. Ev. 344, 345, and cases there cited.

The mere non-payment of money at a specified day is no excuse for refusing to convey, because if an injury result from it, it may be compen-

sated by money, and a court of equity will decree a performance. 2 Lead. Ca. in Eq. 17, and cases there cited.

That if this contract could be thus declared void the defendant would suffer a positive injury, which cannot be compensated by any known rule of damages, and therefore it would be inequitable to allow the plaintiff to recover in this action. 2 Lead. Ca. in Eq. 26, 31.

That the defendant had both the ability and intention to perform his part of the contract, and was only prevented from performing by accident or mistake; and where the ability and intention both exist, equity will compel the plaintiff to perform, unless the defendant has been guilty of gross negligence.

That had the parties intended to have made time of the essence of the contract, they would have so declared it in the proviso; and naming a day for payment is merely formal, and means nothing more than that the payment shall be made in a reasonable time. 2 Lead. Ca. in Eq. 18, Story's Eq. Juris. 1360.

EMMET & MOSS,
D. COOPER,
Att'ys for Appellant.

Jan. 14, 1856.

Supreme Court, Jan. term, 1856—Hercules L. Dousman, appellee, vs. James Stinson, appellant—Assignment of errors, point, and authorities—Filed Jan. 14, 1856—Geo. W. Prescott, clerk.

EMMET & MOSS,
D. COOPER,
Att's for Appellant.

SUPREME COURT,
Territory of Minnesota.

Jan. 25.—January General Term, A. D. 1856, 10th day.

Error to District Court, Ramsey County.

JAMES STINSON, plaintiff in error,
against
HERCULES L. DOUSMAN, defendant in error.

This day came the parties, by their attorneys, and thereupon this cause came on to be heard upon the return to the writ of error issued to the district court of Ramsey county, and upon the grounds assigned for error, and the same was argued by the counsel for the respective parties and submitted to the court.

July 15.—Adjourned from January General Term, A. D. 1856, 18th day.

JAMES STINSON, plaintiff in error,
against
HERCULES L. DOUSMAN, defendant in error.

This cause having been argued and submitted, after due consideration of the matters at issue herein, it appears to the court that in the

proceedings and judgment in this cause in the court below there is no error. It is therefore ordered that said judgment be in all things affirmed with costs to the defendant in error, also interest and ten per cent. damages on said judgment below.

A true record. Attest:

GEO. W. PRESCOTT, *Clerk*.

A true transcript of the record. Attest:

GEO. W. PRESCOTT, *Clerk*.

TERRITORY OF MINNESOTA,
Supreme Court.

HERCULES L. DOUSMAN, def't in error,
against
JAMES STINSON, pl'ff in error.

Costs.

By statute—	
Proceedings before argument - - - - - -	$20 00
Argument - - - - - - - - - -	30 00
Disbursements—	
4 copies of points and authorities - - - - -	6 00
Affidavit of disbursements - - - - - -	25
Officer's fees—	
Clerk's fees to be added - - - - - - -	6 00
	$62 25

TERRITORY OF MINNESOTA,
County of Ramsey, ss:

William Hollinshead being duly sworn says, that he is one of the attorneys for the def't in error above named in the above entitled action, and that the above specified items of disbursements have been made or necessarily incurred therein.

W. HOLLINSHEAD.

Sworn to and subscribed before me, Aug. 7, '56.

ALEX. BUCHANAN,
Notary Public.

GENTLEMEN—You will please take notice, that on Monday, the 11th inst., at 10 a. m., before Geo. W. Prescott, esq., clerk of said court, at his office in the city of St. Paul, an application will be made on behalf of the defendant in error, to have the above specified items of costs

and disbursements and officers' fees inserted in the judgment in said action. Truly y'rs,

HOLLINSHEAD & BECKER,
Atty's for Deft. in Error.

St. Paul, August 7th, 1856.

Messrs. EMMET & Moss and
D. COOPER, Esq.,
Att'ys for Plff. in Error.

The foregoing notice endorsed: Territory of Minnesota Supreme Court.—H. L. Dousman, deft. in error, against James Stinson, plff. in error.—Notice of taxation of costs.—Service of copy of within on us this 7th August, 1856, is hereby admitted.—D. Cooper, per S. J. R. McMillan.

HOLLINSHEAD & BECKER,
Atty's for Deft. in Error.

SUPREME COURT,
Territory of Minnesota.

For January General Term, A. D. 1856.

JAMES STINSON, plaintiff in error,
against
HERCULES L. DOUSMAN, defendant in error.

This cause, brought to this court by writ of error to the district court of Ramsey county, having been argued and submitted: now, pursuant to the order of court, that the judgment below be in all things affirmed, with interest, damages, and costs in this court; on motion of Hollinshead & Becker, attorneys of defendant in error, it is hereby adjudged that the defendant in error above named recover of the plaintiff in error above-named the sum of six hundred and thirty-seven dollars and ninety-nine cents, amount of verdict below, with interest and ten per cent. damages, and sixty-two dollars and twenty-five cents costs, amounting to the sum of $700 24.

Dated August 11, 1856.

GEO. W. PRESCOTT, *Clerk*.

Statement for Judgment.

Amount of verdict below, - - - - - - -		$528 95
Interest on same, - - - - - - - - -		56 15
10 per cent. damages added, - - - - - - -		52 89
		$637 99
Statute costs, $20, $30, - - - -	$50 00	
Disbursement, sworn to, $6 25, - -	6 25	
Clerk's fees, - - - - - - -	6 00	62 25
		$700 24

SUPREME COURT,
Territory of Minnesota.

I, George W. Prescott, clerk of the above entitled court, certify that I have carefully compared the foregoing with the original judgment roll, in the cause therein entitled, which is on file in my office among the files and records of said court, and that the same is in all respects a true and complete copy of said original record and judgment roll.

In testimony whereof I have hereunto set my hand and affixed [SEAL.] the seal of said supreme court, at Saint Paul, this 13th day of November, A. D. 1856.

GEO. W. PRESCOTT,
Clerk as aforesaid.

SUPREME COURT OF THE UNITED STATES.

JAMES STINSON, plaintiff in error,
vs.
HERCULES L. DOUSMAN, defendant in error. } Bond.—In Error.

Know all men by these presents, that we, Lafayette Emmett and David Cooper, of the city of St. Paul, Minnesota, are held and firmly bound unto the above-named Hercules L. Dousman in the sum of one thousand dollars, to be paid to the said Hercules L. Dousman, his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 27th day of August, anno Domini 1856.

Whereas, the above-named James Stinson hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the Supreme Court of the United States for the Territory of Minnesota:

Now, therefore, the condition of this obligation is such, that if the above-named James Stinson shall prosecute his said writ of error to effect, and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

LAFAYETTE EMMETT, [SEAL.]
D. COOPER, [SEAL.]

Sealed and delivered in presence of
M. SHERBURNE.

SUPREME COURT OF THE UNITED STATES.

JAMES STINSON, plaintiff in error,
vs.
HERCULES L. DOUSMAN, defendant in error. } In Error.

TERRITORY OF MINNESOTA,
Ramsey County, ss:

Lafayette Emmett, of the city of St. Paul, being duly sworn, says: That this suit was instituted by Hercules L. Dousman, the defendant

in error, to recover of and from James Stinson, the plaintiff in error, the sum of four hundred and eighty-one dollars and sixteen cents, with interest from the seventh day of February, A. D. 1854, claimed to be due to said Hercules L. Dousman from the said James Stinson, upon an alleged forfeiture of a certain contract, in the complaint in said suit recited, for the sale of certain real estate situated in the city of St. Paul, county of Ramsey, and territory aforesaid, for the sum of eight thousand dollars; that the right of the said defendant in error to declare void said contract to convey, and thereby avoid a specific performance, was, and is, the real question involved in this suit; that the property, described in said contract of sale, at the date of the commencement of this suit, was, and now is, of the value of fifteen thousand dollars; and that the value of the property, and amount thus in controversy in said suit, exclusive of costs, exceeds one thousand dollars.

L. EMMETT.

Sworn to and subscribed before me, this 27th day of August, A. D. 1856.

M. SHERBURNE, *Judge*.